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IN THE HIGH COURT OF JUDICATURE AT BILASPUR .

CR. APPEAL NO. 389 / 2002.

APPELLANT :- ACCUSED .

1. SHANKAR SON OF PUNIT GOND ,
AGED ABOUT- 20 YEARS,
RESIDENT OF KUTHREL (P.S. RANCHIRAI)
DISTRICT : DURG (CHHATTISGARH).

2.) BAIGA ALIAS YUWRAJ SAHU ,
SON OF BUDHRAM , AGE - 25 YEARS,
R/O ARMARI KALA : P.S. GURUR :
DISTT. DURG (C.G.).

:: V E R S U S ::

RESPONDENT :- STATE OF CHHATTISGARH

APPEAL UNDER SECTION 374(2) OF CODE OF CRIMINAL PROCEDURE .

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by Shri S.L. Agrawal Advocate
R. to D.R. (J)

(26)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 991 of 2002

SHRAWAN

Versus

STATE OF CHHATTISGARH

&

Criminal Appeal No. 389 of 2002

SHANKAR & ONE ANOTHER

Versus

STATE OF CHHATTISGARH

JUDGMENT

Post for: 18.05.2007

Sd-
Sunil Kumar Sinha
Judge
17.05.2007

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 991 of 2002

APPELLANT	SHRAWAN SON OF ITWARI GOND, AGE 22 YEARS, RESIDENT OF VILLAGE KUTHREL, P.S. GUNDERDEHI, DISTRICT DURG (CHHATTISGARH)
	Versus
RESPONDENT	STATE OF CHHATTISGARH

&

Criminal Appeal No. 389 of 2002

APPELLANTS	1. SHANKAR SON OF PUNIT GOND, AGED ABOUT – 20 YEARS, RESIDENT OF KUTHREL (P.S. RANCHIRAI), DISTRICT DURG (CHHATTISGARH) 2. BAIGA ALIAS YUWRAJ SAHU, SON OF BUDHRAM, AGE – 25 YEARS, R/O ARMARI KALA, P.S. GURUR, DISTT. DURG (C.G.)
	Versus
RESPONDENT	STATE OF CHHATTISGARH

(Appeals under Section 374 (2) of Cr.P.C.)

Appearance:

Shri S.P. Agrawal and Neelkanth Malviya, Advocates for the appellants.

Shri Sandeep Yadav, Dy. Govt. Advocate for the State.

JUDGMENT
(18.05.2007)

Sunil Kumar Sinha, J.

(1) Being aggrieved with the judgment of conviction and order of sentences dated 28.3.2002 passed in Sessions Trial No. 144/2001 by the First Additional Sessions Judge, Durg, whereby the said Court, after holding the appellants guilty of offence punishable u/ss 341 & 307 r/ws. 34 I.P.C., sentenced them to undergo R.I. for 1 year and R.I. for 10 years & to pay a fine of Rs. 500/-, in default of payment of fine to further

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undergo R.I. for 6 months respectively, the appellants have preferred these appeals under Section 374 (2) Cr.P.C.

(2) The brief facts are that the victim namely Ku. Domeshwari and appellant- Shrawan, both were students of Class 11th and were studying in High School, Batrel. Prior to the date of incident, appellant-Shrawan had teased and assaulted the victim, on which, some report was made by the victim and this appellant was taken into custody by the police and later on, he was released. The case of the prosecution is that on 15.3.2001 at about 2.00 p.m., Domeshwari (P.W.-1) was returning from her School to village- Gatapar. She was on her bicycle and was accompanied by her three friends namely- Yamuna, Ku. Jageshwari (P.W.-2) and Nityanand (P.W.-3), who were also on their bicycles. On the way, when they reached near the forest nursery, on account of previous animosity, appellant-Shrawan and his two associates came on the road and Shrawan caught the handle of the bicycle of Domeshwari (P.W.-1), due to which, she fell down on the ground and thereafter, he gave her multiple knife blows on her head, neck, stomach and other vital parts of the body. The other two appellants also assaulted the victim with the knife. In the meanwhile, a public bus came over there, seeing which, the appellants ran away from the seen of occurrence. The victim became semi unconscious. This message was sent to her father namely- Khuman (P.W.-9), who immediately reached to the spot and took the victim to Dr. Baldauram (P.W.-6) in village Batrel, who after giving the first add to her, advised to take her to Dhamtari Hospital, on which, she was taken to Dhamtari Hospital. In Dhamtari Hospital, the victim was medically examined by Dr. N.B. Singh and Dr. (Smt.) Vina Chatterjee (P.W.-13) and medical report Ex.-P/25 was prepared. The contents of the report would show that the following injuries were noticed by the Doctors :

1) An incised wound on the front portion of head admeasuring 6 cm. x ½ cm. x 1 cm;
2) An incised wound on the left side of the head admeasuring 7 cm. x ½ cm. x 1 cm;

3) An incised wound on the back side of the head admeasuring 12 cm. x ½ cm. x 1 cm.;

4) An incised wound on the back side of neck admeasuring 10 cm. x ½ cm. x 2 cm.;

5) An incised wound on the lower portion of the neck admeasuring 12 cm. x ½ cm. x 3 cm.;

6) An incised wound on the stomach admeasuring ½ cm. x 1 cm. x 1 cm.;

7) An incised wound on the lower portion of the stomach admeasuring ½ cm. x 1 cm. x 1 cm.;

8) An incised wound on the buttock admeasuring ½ cm. x 1 cm. x 1 cm.; and

9) Another incised wound just above buttock admeasuring ½ cm. x 1 cm. x 1 cm.

Except injuries No. 1 & 2, all the injuries were simple in nature. Later on, the victim was admitted to the hospital on 15.3.2001, where she remained upto 26.3.2001. During this period, a *Dehati Nalishi* was recorded on 15.3.2001 at about 20.30 hours vide Ex.-P/1 and her dying declaration was also recorded by the Executive Magistrate at about 8.10 p.m. on the same day vide Ex.-P/2. Based on *Dehati Nalishi,* F.I.R. (Ex. P/17) was registered.

(3) During the course of investigation, the appellants were arrested under Ex.-P/18 to Ex.-P/20 and appellants, Shankar & Baiga @ Yuwraj were put to identification on 1.4.2001 and were duly identified by Jageshwari (P.W.-2) and Nityanand (P.W.-3). The identification memo is Ex.-P/5. In further investigation, the memorandums of appellants-Yuwraj, Shankar & Shrawan were recorded under Ex.-P/9, Ex.-P/10 & Ex.-P/11 and three knifes were seized, in consequences of these memorandums. The bed-head-ticket of the victim (Ex.-P/26) and X-ray Plate (Ex.-P/27) were also seized and after recording 161 Cr.P.C. statements of witnesses and further after completion of usual investigation, a charge-sheet under the aforesaid Sections of I.P.C. was filed.

(4) At the trial, the Sessions Judge recorded a finding that the injuries sustained by the victim were fatal to her life and the

death may have been caused as a consequence of these injuries. He also recorded a finding that all these appellants had participated in causing injuries to the victim, therefore, they all were guilty of offence u/s 307/34 I.P.C. along with Section 341 I.P.C.

(5) Learned counsel for the appellants argued that the injuries sustained by the victim were not sufficient to cause death in the ordinarily course of nature, therefore, it is not a case of attempt to life and an offence u/s 307/34 I.P.C. would not be made out against appellant-Shrawan. For 2 other appellants, they argued that their participation is doubtful, therefore, they may be given benefit of doubt. Alternatively, they also argued that the sentences imposed against the appellants are too harsh, which may be reduced to the minimum, preferably to the period already undergone. They submitted that appellant-Shrawan is in jail since 20.3.2001 and he has completed more than 6 years and 2 months and other 2 appellants have also undergone for a period of about 1 year and 8 months.

(6) On the other hand, learned counsel for the State opposed these arguments. He supported the judgment of conviction and order of sentences passed by the Sessions Court.

(7) I have heard the learned counsel for the parties at length and have also perused the records of the sessions trial.

(8) First of all this to be seen as to whether an offence u/s 307/34 I.P.C. is made out or not, and in case, it is made out, who are the culprits ?

(9) So far as constitution of offence under Section 307 of IPC is concerned, it has been held by the Apex Court in the matter of ***Sarju Prasad –Vs- State of Bihar, AIR 1965 S.C. 843,*** that in order to bring the offence home to accused, the prosecution must establish that his intention was one of the three kinds mentioned in Section 300 I.P.C. The state of mind of the accused

has to be deduced from surrounding circumstances and motive would be a relevant circumstance and where the evidence is not sufficient to establish with certainty, existence of requisite intention or knowledge of accused, the accused can be convicted only under Section 324 and not under Section 307 of IPC.

(10) In the matter of ***Hari Kishan & State of Haryana -Vs- Sukhbir Singh and others AIR 1988 S.C. 2127,*** the Apex Court further held that under Section 307 IPC, what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder." Under Section 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention.

(11) If we look into the evidence of P.W.-1 Ku. Domeshwari, she deposed that when she was returning from school along with her friends namely Yamuna, Ku. Jageshwari (P.W.-2) and Nityanand (P.W.-3), 3 boys came out from the side of the nursery. Shrawan has been named by her. She deposed that Shrawan caught her bicycle, abused her and he gave two knife blows in her stomach, thereafter he also gave knife blows towards her left eye, neck and on the back portion of the neck and on her head etc. She specifically deposed that the repeated blows were made on her head and many blows were made on the left arm and left thigh, and also on her back. She fell down, when her friends intervened for rescue, then, the assailants ran away from the place of occurrence. In 3rd paragraph of her evidence, she

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deposed that firstly Shrawan had assault on her stomach by knife, thereafter, other 2 persons had assaulted by knife and all 3 persons had participated in assault. This witness has not named the 2 other assailants. The version of this witness is fully corroborated by medical evidence, as her medical report (Ex.-P/25) would show that she received as many as 9 incised wounds, which were admeasuring from 12 cm. to 1 cm. having some depth and Dr (Smt.) Vina Chatterjee (P.W.-13) has opined that out of 9 injuries, injuries No. 3 to 9 were of simple in nature, whereas injuries No. 1 & 2 were of grievous in nature. In para-7, she deposed that if the victim would not have been given medical assistance in time, then, she would have died out of injuries sustained by her. The bed-head-ticket (Ex.-P/26) would further show that the victim was admitted in the hospital from 15.3.2001 to 26.3.2001 and she was brought unconscious and was vomiting at the time of her admission. The weapons of the offence (Knives) which were used by the appellant Shrawan and other 2 assailants were having long length (15 cm. to 9 ½ cm.) and breadth of their sharp edges was 1 ½ cm.

(12) P.W.-2 Ku. Jageshwari has turned hostile but P.W.-3 Nityanand has supported the evidence of P.W.-1 Domeshwari and has clearly deposed that she was mainly assaulted by appellant Shrawan by knife and when she fell down, the 2 other assailants had assaulted her by knife. According to P.W.-1 Domeshwari, prior to this incident, on some small matter, an assault was made to her in the school itself, for which, she has reported the matter to the Head Master, who thought it better to take the police intervention and at the instance of this girl, appellant Shrawan, who was her class mate, was taken into custody and was, later on, released.

(13) The out come of all these evidence would show that the deadly weapons were used and the accused persons had ambushed at the place chosen by them, which was a lonely place and there was a motive for the crime with accused/appellant Shrawan because he was not happy with the

conduct of the girl on account of the above instance and the accused persons have severely given blows to the victim and they had chosen the vital parts of the body of the victim like head, neck and stomach etc., therefore, the intention and knowledge of the assailants, particularly appellant Shrawan is writ large on record that he wanted to attempt the life of the girl, which has preceded the act attributed to him and in the facts and circumstances of the case, an offence u/s 307 I.P.C. would be made out in this matter.

(14) Now question arises as to who were the assailants ? On the basis of above evidence i.e. evidence of P.W.-1 Domeshwari and P.W.-3 Nityanand, it is established beyond reasonable doubt that appellant Shrawan was one of the assailants, who actively participated in commission of crime and most of the fatal blows, particularly causing injuries No. 1 & 2 were inflicted by him and he was responsible for commission of the said offence along with other 2 assailants. About participation of the other 2 appellants, Shankar and Baiga @ Yuwraj, (as 2 of the other assailants) the evidence is shakey. Admittedly, 2 other assailants were not known to the victim or witnesses, therefore, they have not been named by them. The first-hand information regarding commission of crime was *Dehati Nalishi* dated 15.3.2001 (Ex.-P/1), which was recorded on the information of the victim herself. In this document, the names of these appellants are not there. Later on, in the dying declaration also, their names have not been mentioned and even in this document, the victim has not attributed any role to 2 other assailants. The contents of the dying declaration would show that the victim had made allegations against appellant Shrawan only and even the participation of other 2 assailants has not been mentioned in it. In the dying declaration, statement regarding manner of injuries received is vital because according to the dying declaration, only one person (Shrawan) had assaulted the victim, who alone had participated in commission of crime. After the arrest, the other 2 assailants were put to identification and the content of the

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identification memo would show that they were duly identified by P.W.2 Jageshwari and P.W.-3 Nityanand. Why the identification was not conducted by victim, has not been explained by the prosecution. The victim was the best witness to identify the assailants. This identification was conducted on 1.4.2001 at about 12.30 p.m. Admittedly, the victim was hospitalized from 15.3.2001 to 26.3.2001, therefore, she was ordinarily available with the police on 1.4.2001 and she could have been called by the Magistrate to identify the other 2 assailants, which has not been done. Moreover, as stated above, P.W.-2 Jageshwari has turned hostile and she has not supported the case of prosecution. In one line, she has stated that she had identified the accused persons. P.W.-3 Nityanand has stated that he had put his signature on identification memo, at the time of identification of accused persons. In the cross examination para-13, he has deposed that they had gone to jail for three times for the purpose of identification but two times T.I. parade was not conducted for some reason and 3rd time, it was conducted, he had identified the appellants.

(15) If we evaluate the evidence of identification on the face of evidence of P.W.-1/victim Domeshwari, particularly with reference to her dying declaration, some doubt is created, as the victim has not stated in the dying declaration that 2 other persons were also involved in assaulting her and she has only said about one participant naming the appellant Shrawan. When the omission was put to her in her cross examination, she stated vide para-12 that she has told about 3 persons. On the basis of her dying declaration, the actual involvement of 2 other persons becomes suspicious and in light of above, the evidence of identification, cannot be given much weightage and a shadow of doubt is created as to whether 3 persons had actually participated or not and if participated, whether the other 2 appellants were the same persons. Therefore, these 2 appellants namely Shankar and Baiga @ Yuwraj are entitled for benefit of doubt and in consequences acquittal.

(16) Coming to the quantum of sentences against appellant Shrawan, looking to the peculiar facts and circumstances of the case that the victim and this appellant, both were studying in the same institution in Class 11th and on some small dispute, this appellant was taken into custody at the instance of the victim and further looking to his age, which was 20 years at the time of incident and also that he is continuously in jail since 20.3.2001 thereby he has already undergone for a period of 6 years & 2 months, I deem it proper to reduce his sentence to R.I. for 7 years.

(17) In the result, Cr.A. No. 991/2002 is partly allowed. The conviction awarded to appellant Shrawan u/ss 341 & 307/34 I.P.C. are maintained. Sentence u/s 341 is also maintained. However, the jail sentence u/s 307/34 I.P.C. is reduced to 7 years in place of 10 years. Cr.A. No. 389/2002 is allowed in full. The conviction and sentences awarded to the appellants Shankar and Baiga @ Yuwraj are set aside giving them benefit of doubt. They are acquitted for the charges framed against them.

Sd-
Sunil Kumar Sinha
Judge

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